Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Jeff Goodwin,

complainant,

and

International Brotherhood of Electrical Workers, Local 230,

respondent,

and

Shaw Cablesystems G.P.,

employer.

Board File: 30158-C
Neutral Citation: 2014 CIRB 723
April 25, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and André Lecavalier, Members.

Parties' Representatives of Record

Ms. Heather M. Cane, for Mr. Jeff Goodwin;

Ms. Shona A. Moore, Q.C., for the International Brotherhood of Electrical Workers, Local 230;

Mr. Kerry Hunt, for Shaw Cablesystems G.P.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

[1] Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

I. Nature of the Complaint

[2] On October 3, 2013, the Board received a duty of fair representation (DFR) complaint from Mr. Jeff Goodwin alleging that the International Brotherhood of Electrical Workers, Local 230 (IBEW) had violated the *Code*.

[3] The IBEW had filed a grievance contesting Shaw Cablesystems G.P.'s (Shaw) decision to terminate Mr. Goodwin's employment. However, after employees in the bargaining unit voted in favour of revocation, the IBEW advised Mr. Goodwin that it would not represent him at his upcoming arbitration. Mr. Goodwin incurred significant expense in pursuing arbitration on his own and eventually obtained a settlement.

[4] Mr. Goodwin alleged the IBEW's change in position following the revocation of its bargaining certificate violated the *Code*. The IBEW, on the other hand, argued it had no further legal obligations under the *Code* once the employees in the bargaining unit had voted to revoke its exclusive right to represent them.

[5] The Board has concluded that Mr. Goodwin failed to demonstrate that the IBEW had violated the *Code*.

II. Facts

[6] On August 8, 2012, Shaw terminated Mr. Goodwin's employment.

[7] On October 30, 2012, the IBEW scheduled an arbitration before arbitrator Colin Taylor to contest whether Shaw had just cause to terminate Mr. Goodwin's employment.

[8] On April 4, 2013, following the holding of a representation vote, the Board revoked the IBEW's October 9, 2003 certification.

[9] By letter dated July 5, 2013, counsel for the IBEW provided Mr. Goodwin with a copy of the arbitrator's Notice of Hearing for the dates of September 17–19, 2013. That letter further advised Mr. Goodwin of the IBEW's position following the Board's revocation of its certificate:

> ...
>
> **This matter was referred to arbitration by the Union pursuant to the collective agreement. As you are well aware, the Union's certification was revoked as a result of a representation vote conducted amongst employees in the bargaining unit.**
>
> This is notice that the Union will not appear at the arbitration scheduled in September.
>
> **You may decide to appear on your own behalf at the arbitration. If you do so, you will be responsible for one-half of the cost of the arbitrator's fees. I want to emphasize that the Union will not be responsible for those costs.**
>
> Please contact me on or before July 12, 2013 to let us know whether you intend to go to the arbitration. If I do not hear from you by the close of business on July 12, 2013, I will communicate with the arbitrator to advise him that the Union withdraws from that arbitration.
>
> It is important that you decide one way or the other whether you intend to go to the arbitration or not. You may have determined not to return to your employment at Shaw.
>
> ...
>
> (emphasis added)

[10] In a letter dated July 15, 2013, legal counsel for the IBEW also advised the arbitrator of its position:

> This is to advise that the Union's certification as bargaining agent for employees of Shaw Cablesystems (Campbell River) was recently revoked by order of the Board. Accordingly, please be advised that the Union will not be in attendance at the arbitration scheduled to proceed on September 17, 18 and 19, 2013.
>
> We have advised the grievor, Jeff Goodwin, that the Union will not be in attendance at the arbitration. We have also advised Mr. Goodwin of his right to continue with the termination arbitration, in the absence of the Union. We have been unable to receive confirmation from Mr. Goodwin that he intends to proceed with the arbitration.
>
> ...

[11] Mr. Goodwin, who lives in Campbell River, was ultimately forced to retain legal counsel in Vancouver. Mr. Goodwin also had to place $11,000 in trust for his share of the arbitrator's fees.

[12] On August 20, 2013, Mr. Goodwin's legal counsel wrote to IBEW's counsel requesting that it represent Mr. Goodwin at the arbitration:

> We have recently been retained by Mr. Jeff Goodwin with respect to the above noted matter.
>
> ***We write in furtherance of your letter to Mr. Goodwin dated July 5, 2013 in which you state that the Union will not be appearing at the arbitration of this matter and that should Mr. Goodwin decide to appear on his own behalf that the Union will not be responsible for the costs of the arbitration.***
>
> It appears from your letter that the reason the Union decided it would no longer represent Mr. Goodwin at the arbitration is due to the revocation of the Union's certification. It is our understanding that the matter was referred to arbitration by the Union long before the revocation of the Union's certification.
>
> We ask that you provide us with the case law on which the Union relied in deciding not to represent Mr. Goodwin at the upcoming arbitration so that we are able to advise our client as to whether he should proceed with filing a written complaint with the Canada Industrial Relations Board pursuant to subsection 92(2) of the *Canada Labour Code* (the "*Code*") for failing to comply with section 37 of the *Code*.
>
> Given that Mr. Goodwin has been unemployed for more than 12 months, is required to make a payment, to the arbitrator, in the amount of $11,000 on or before August 30, 2013, and the pending arbitration, we ask that you provide us with your response no later than close of business on **Friday, August 23, 2013**.
>
> [*sic*]
>
> (bold in original; bold italics added)

[13] In its August 23, 2013 response, IBEW counsel advised Mr. Goodwin's lawyers that it was not obliged to fund the arbitration. Its legal obligations had ceased when the Board revoked its certification:

> **The Union acknowledges your advice that Mr. Goodwin has not secured new employment since Shaw terminated his employment in Campbell River. However, while Mr Goodwin may be entitled to proceed with the arbitration, the Union does not have a legal obligation to fund the arbitration.**
>
> In our view, the Union has no legal obligation to continue with grievances after the revocation of its certification. If you are aware of any cases to the contrary, we invite you to let us know.
>
> (emphasis added)

[14] Legal counsel exchanged further correspondence setting out their respective views on the IBEW's obligations, if any.

[15] Ultimately, Mr. Goodwin and Shaw negotiated a settlement at the arbitration.

III. Analysis and Decision

[16] Section 37 of the *Code* imposes a DFR on bargaining agents:

> 37. **A trade union or representative of a trade union that is the bargaining agent for a bargaining unit** shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.
>
> (emphasis added)

[17] The *Code* in section 3 defines a bargaining agent as follows:

> 3. (1) In this Part,
>
> ...
>
> "bargaining agent" means
>
> (*a*) a trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and **the certification of which has not been revoked**, or
>
> (*b*) any other trade union that has entered into a collective agreement on behalf of the employees in a bargaining unit
>
> (i) the term of which has not expired, or
>
> (ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining;
>
> (emphasis added)

[18] Section 42(*a*) of the *Code* establishes the impact a revocation has on a collective agreement:

> 42. Where the Board makes an order under section 39, subsection 40(2) or section 41 revoking the certification of a trade union or council of trade unions, or declaring that a trade union is not entitled to represent the employees in a bargaining unit,

> (*a*) any collective agreement between the trade union or council of trade unions and the employer of the employees in the bargaining unit that applies to the bargaining unit ceases to have effect from the time the order is made or from such later time as the Board considers appropriate.

[19] The parties filed helpful submissions on whether a trade union continues to owe a grievor a duty if it had committed to proceed to arbitration prior to the revocation of its certification.

[20] For the purposes of this decision, the Board will assume, solely for the sake of argument, that a trade union's duty of fair representation continues to exist. Can a trade union take into account the revocation of its certificate when deciding its future role in an already scheduled arbitration?

[21] Mr. Goodwin, who bears the burden of proof in this case, has not persuaded the Board that the IBEW's actions following the revocation of its certificate met the high threshold in section 37 of being arbitrary, discriminatory or carried out in bad faith.

[22] When the IBEW acted as Mr. Goodwin's certified bargaining agent, it fully intended to represent him at arbitration to contest his termination. The later change in the IBEW's intentions did not arise on a whim, but rather resulted from the fact that a majority of the members in the bargaining unit had voted to take away its exclusive right to represent them.

[23] The impact of that vote is clear. Among other things, the employees in the unit were no longer required to pay dues, via Shaw's mandatory payroll deductions, to fund the IBEW's representation efforts. Several of the IBEW's letters refer to the funding of Mr. Goodwin's arbitration.

[24] The Board fully appreciates Mr. Goodwin's sentiment that he had paid the IBEW dues throughout his employment, but when he needed its assistance, the IBEW declined to assist him at arbitration. But the Board can also appreciate the IBEW's perspective. If members of the bargaining unit were no longer paying dues to support the IBEW's activities, it needed to consider, *inter alia*, the funding implications of Mr. Goodwin's arbitration.

[25] The employees' decision to vote in favour of decertification caused the IBEW to examine what, if anything, it would do for Mr. Goodwin and his pending arbitration. The IBEW did not simply close its file on Mr. Goodwin and disappear. It considered the changed situation,

including its lack of status as Mr. Goodwin's bargaining agent, and advised Mr. Goodwin of its decision. The IBEW ensured Mr. Goodwin was aware of the scheduled arbitration, advised him of his right to proceed with his own counsel and later corresponded with that counsel.

[26] In the course of that correspondence, the IBEW provided Mr. Goodwin with relevant documentation.

[27] The IBEW similarly demonstrated a willingness to cooperate with Mr. Goodwin. For example, counsel for the IBEW attended the opening phase of the first day of the arbitration and submitted case law concerning the arbitrability of Mr. Goodwin's grievance.

[28] The issue therefore is not whether it might have been a good public relations move for the IBEW to provide Mr. Goodwin with continued assistance. No one contested that the IBEW could have volunteered to represent Mr. Goodwin at arbitration. Trade unions often assist employees, even in the absence of a certification order.

[29] However, the issue is whether the IBEW, given its significantly changed circumstances, had no option but to continue with the previously-scheduled arbitration, failing which it would violate section 37 of the *Code*.

[30] Mr. Goodwin did not satisfy the Board that the IBEW, following the revocation of its certificate, and given its efforts to provide Mr. Goodwin with the information he needed to continue with the arbitration, acted in an arbitrary, discriminatory or bad faith manner when it refused to represent him at arbitration.

[31] The IBEW turned its mind to the situation, came to a justifiable conclusion and advised Mr. Goodwin of its position within a reasonable time period.

[32] In the Board's view, even accepting for the sake of argument that a DFR obligation continued to apply, the IBEW's decision not to take the grievance to arbitration after the revocation of its certification did not violate the *Code*.

[33] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

André Lecavalier
Member